

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

IN RE:

CASE NO. 19-50900-cag

**LEGENDARY FIELD
EXHIBITIONS, LLC, et al.,**

CHAPTER 7

DEBTORS.

COLTON SCHMIDT, et al.,

PLAINTIFFS,

ADV. PROC. NO. 19-05053-cag

v.

JUDGE CRAIG A. GARGOTTA

AAF PLAYERS, LLC, et al.,

DEFENDANTS.

**CREDITORS THOMAS G. DUNDON AND DUNDON CAPITAL PARTNERS LLC'S
OBJECTION TO THE TRUSTEE RANDOLPH N. OSHEROW'S
APPLICATION TO EMPLOY ABIR COHEN TREYZON & SALO, LLP AND
THOMPSON COBURN LLP AS SPECIAL LITIGATION COUNSEL**

Pursuant to Local Rule 2014 of the United States Bankruptcy Court for the Western District of Texas, Creditors Thomas G. Dundon and Dundon Capital Partners LLC ("DCP") (together, "Dundon") file this Objection to Trustee Randolph N. Osherow's Application to Employ Abir Cohen Trezon & Salo, LLP and Thompson Coburn LLP as Special Litigation Counsel for Reid Collins & Tsai, LLP (the "Application"). (Doc. No. 462).

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I. SUMMARY

The Retained Firms¹ can be loyal to the Adversary Plaintiffs² or the Trustee Randolph N. Osherow (the “Trustee”) on behalf of the bankruptcy estate (the “Estate”), but not both. Dundon objects to the Application because there is an actual conflict of interest between the two sets of parties the Retained Firms purport to represent concurrently.

On the heels of the settlement in the Adversary Proceeding, the Trustee (on behalf of the Estate) filed the Application to employ the Retained Firms as special litigation counsel (Doc. No. 462), and the Court entered the Order granting the Application the next day (the “Order”) (Doc. No. 463). The Trustee engaged the Retained Firms for the purpose of (among other things) investigating claims against Dundon on behalf of the Estate debtors. The arrangement is problematic because the Retained Firms already represent the Adversary Plaintiffs (judgment creditors) and have existing claims for their contingent attorneys’ fees against the Estate. There is no doubt the Retained Firms are adverse to the Estate.

Further, Dundon, the Trustee, and its existing counsel worked together for nearly three years to defeat the Adversary Plaintiffs’ claims in the Adversary Proceeding. Prior to the settlement in the Adversary Proceeding, the Trustee aligned interests with Dundon. They shared strategic initiatives, plans, and agreed (right before the settlement and just short of engagement) to retain the same expert to opine on behalf of all defendants. If leaked to the Retained Firms, the Trustee’s knowledge of these strategic plans, especially as it relates to defending against class certification, could severely harm Dundon. And the Trustee obtained that knowledge under a clear

¹ Dundon refers to Abir Cohen Treyzon & Salo, LLP as (“ACTS”) and Thompson Coburn LLP as (“TC”) and both ACTS and TC collectively as the “Retained Firms.”

² Dundon refers to Plaintiffs Colton Schmidt and Reggie Northrup, on behalf of themselves and all others similarly situated as the “Adversary Plaintiffs,” and the adversary proceeding pending in this bankruptcy, Case No. 19-05053-cag as the “Adversary Proceeding.”

understanding of joint defense confidentiality.³ Now, the Trustee seeks to employ the Retained Firms, who still represent the Adversary Plaintiffs, while the Retained Firms investigate and pursue claims on behalf of the Trustee against Dundon in a parallel action. This arrangement is not permissible or appropriate because the Retained Firms have the opportunity to gain access to information from Dundon's formerly aligned party—the Trustee—and use it against Dundon in the ongoing class action suit. And it is impossible to imagine how the Trustee, its current counsel, and the Retained Firms could forge a sufficiently protective barrier to protect the strategic confidences of Dundon.⁴

In sum, Dundon asks the Court to sustain their objection and rescind the Order because there is an actual and, alternatively, potential conflict of interest that prevents the Trustee from employing the Retained Firms.

II. FACTUAL BACKGROUND

A. The Trustee and Dundon Collaborated to Defeat Class Certification in the Adversary Proceeding filed by ACTS.

1. On April 10, 2019, ACTS, on behalf of class plaintiffs, filed a lawsuit against Dundon, among others, in the Superior Court of California in San Francisco County, California. Dundon removed that case to the United States District Court for the Northern District of California. *Colton Schmidt and Reggie Northrup v. AAF Players LLC, et al.*, 3:19-cv-03666-CRB (Doc. No. 1) (N.D. Cal.).

2. The Northern District of California subsequently transferred the case to the United

³ Dundon always understood that he and the Trustee could and would likely eventually become adverse because there were threatened claims between them from the outset. But, there was a clearly established détente between them as it related to seeking an early dismissal and/or defeating class certification in the Adversary Proceeding.

⁴ Of course, once the Adversary Proceeding is resolved, any concerns about retaining the Retained Firms would vanish as Dundon's shared strategic confidences primarily related to defending against the Adversary Proceeding.

States District Court for the Western District of Texas, San Antonio Division, which referred the matter to this Bankruptcy Court, where it remains pending as the Adversary Proceeding. *Id.* at Doc. No. 27; *Colton Schmidt and Reggie Northrup v. AAF Players LLC, et al.*, 19-05053-cag (Bankr. W.D. Tex.). Importantly, ACTS sued the Estate, represented by the Trustee, as defendants in what became the Adversary Proceeding. *See AAF Players LLC*, 19-05053-cag at Doc. No. 21.

3. After the Western District referred this case to this Court, the Adversary Plaintiffs retained Katherine Clark of the law firm Hendrick Kring, PLLC. *Id.* at Doc. No. 72. Ms. Clark continued her representation of Plaintiffs when she transitioned to her current firm, TC, where she and Nicole Williams represent the Adversary Plaintiffs. *Id.* at Doc. Nos. 174, 178.

4. Dundon and Defendant Charles Ebersol filed motions to dismiss with this Court. *See id.* at Doc. Nos. 29, 38–40, 46, 94. After multiple pleading amendments and hearings on subsequent motions to dismiss, the Defendant Parties proceeded to phased discovery. *Id.* at Doc. No. 135.

5. During phased discovery, Dundon worked with the other defendants, including the Trustee, to defeat the Adversary Proceeding. Ex. 1 ¶ 3. As part of that collaboration, Dundon and the Trustee shared strategic initiatives, plans, and agreed initially to retain the same expert to opine on behalf of all defendants. *Id.* There was a clear understanding and frequent discussion among the Defendants’ counsel that the Defendants were sharing strategic confidences to collectively defeat class certification. *Id.* Ultimately, the parties did not go through with the joint retention because the Trustee, Mr. Ebersol, and the Adversary Plaintiffs entered a settlement agreement. *Id.* ¶ 4.

B. Trustee’s Counsel Settled the Class Action Lawsuit and Continues to Pursue Claims Against Dundon.

6. In August 2021, the Adversary Plaintiffs entered a settlement agreement with the

Trustee and Ebersol, but not Dundon. *See AAF Players LLC*, 19-05053-cag at Doc. No. 175. Dundon objected to the settlement, which the Court overruled. *Id.* at Docs. Nos. 187, 215. Accordingly, the parties proceeded to class certification for settlement.

7. As part of the settlement, the Adversary Plaintiffs assigned to the bankruptcy estate “all their rights and interest in any and all claims against the Debtor and Ebersol and their right to recovery of certain damages recoverable against Dundon limited specifically to the amounts not paid under the Standard Player Agreements.” *Id.* at Doc. No. 210 ¶ 13(f). The Adversary Plaintiffs, however, retained their claims for fraud and promissory fraud against Dundon in the adversary, which remain pending against Dundon. *See id.* (the case is still in phase 1 discovery relating to certification and certification briefing lies ahead).

8. On February 9, 2022, the Court entered the Order for (1) Final Approval of the Settlement Agreement; (2) Class Certification Pursuant to Settlement Agreement; (3) Appointment of Class Counsel and Class Representatives Pursuant to Settlement Agreement; and (4) Approval of Compensation for Class Counsel and Service Awards for Class Representatives. *Id.* at Doc. No. 215. The following month, the Court entered a Partial Final Judgment Under Federal Rule of Civil Procedure 54(b) resulting from the settlement agreement. *Id.* at Doc. No. 222.

9. The Retained Firms continue to represent the Adversary Plaintiffs against Dundon to pursue the same claims against Dundon in the Adversary Proceeding with which Dundon collaborated with the Trustee. The Retained Firms now seek to represent the Trustee—Dundon’s former ally in the Adversary Proceeding—against Dundon. *Id.* at Doc. No. 224.

10. The Trustee and Dundon shared confidential strategic information, including the retention and call of a rebuttal expert and discussions of what the expert’s impressions and potential opinions, as well as strategic discussions regarding substantive areas of attack on class

certification issues and depositions of class representatives and other class discovery.⁵

C. The Court Approved the Application.

11. On March 31, 2022, the Trustee filed the Application seeking to employ the Retained Firms. (Doc. No. 462). In the Application, the Trustee details his intent for the Retained Firms “to investigate, analyze, and pursue any remaining estate claims involving the management, financing, and operation of the Debtors.” *Id.* ¶ 21.

12. As an exhibit to the Application, the Trustee included the engagement letter of ACTS, which specifically identifies the “**Nature and Scope of Representation.**” (Doc. No. 462-3 at 3). In this scope, the Retained Firms must “investigate, develop, and assert causes of action and rights the estates may have against certain of the debtors’ former directors and officers, insiders, stockholders, and control parties and insurers (the ‘Claims’), including without limitation [Dundon]” *Id.*

13. The Court granted the Application on April 1, 2022. (Doc. No. 463). Regardless, Local Rule 2014(d) provides: “A party in interest who opposes an application for employment may file an objection within 21 days after the date of service of the application summary, and such objection shall be set for hearing *notwithstanding the Court’s order granting the application to employ.*” (emphasis added).

III. ARGUMENTS AND AUTHORITIES

A. Legal Standard

The Bankruptcy Code permits the Trustee to employ attorneys, with the Court’s approval, so long as they do “not hold or represent an interest adverse to the estate, and that the professional be ‘disinterested’ [under the Code].” *In re Am. Int’l Refinery, Inc.*, 676 F.3d 455, 461–62 (5th Cir.

⁵ Dundon avoids any details here so as to not divulge the strategic confidences but enough to give the court high level understanding of the exchanges.

2012) (internal quotation omitted) (citing 11 U.S.C. § 327(a); *W.F. Dev. Corp. v. Office of the U.S. Tr. (In re W.F. Dev. Corp.)*, 905 F.2d 883, 884 (5th Cir. 1990)). To determine whether an attorney may represent a Trustee under Section 327, courts determine whether the attorney: (1) holds or represents any interest that is adverse to the estate and (2) is a “disinterested person.” *In re HML Enters., LLC*, No. 16-90030, 2016 WL 5939737, at *6 (Bankr. E.D. Tex. Oct. 12, 2016).

The first prong, analyzing adverse interest, “is objective and precludes any interest or relationship, *however slight*, that would even faintly color the independence and impartial attitude required by the Code and Bankruptcy Rules.” *Id.* (emphasis added) (quoting *In re JMK Constr. Grp., Ltd.*, 441 B.R. 222, 229 (Bankr. S.D.N.Y. 2010)). With an eye to the specific facts of the case, the Fifth Circuit views this “adverse interest” to mean: “(1) to possess or assert *any* economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.” *In re W. Delta Oil Co., Inc.*, 432 F.3d 347, 356 (5th Cir. 2005) (emphasis added) (citation omitted); *see also Pierson & Gaylen v. Creel & Atwood, (In the Matter of Consol. Bancshares, Inc.)*, 785 F.2d 1249, 1256 (5th Cir. 1986) (emphasis added) (quotation omitted) (Noting disinterestedness includes “anyone who in the *slightest degree* might have some interest or relationship that would color the independent and impartial attitude required by the [Bankruptcy] Code”).⁶ The “no conflict of interest” requirement of Section 327(a) serves the important policy of ensuring that attorneys “tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities.”

⁶ Other courts in this Circuit have articulated the definition of adverse interest “in terms of motivation: whether the attorney possesses a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors.” *In re Age Ref., Inc.*, 447 B.R. 786, 802 (Bankr. W.D. Tex. 2011) (quotation omitted). Similarly, “[a]n actual conflict is said to exist when there is an active competition between two competing interests, in which one interest can only be served at the expense of the other.” *HML Enters.*, 2016 WL 5939737, at *7 (quotation omitted).

HML Enters., 2016 WL 5939737, at *5 (quotations omitted). Upon the objection by a creditor, however, the Court must “disapprove such employment if there is an actual conflict of interest.” 11 U.S.C. 327(c). Sections 327(a) and (c) “impose a *per se* disqualification as trustee’s counsel of any attorney who has an actual conflict of interest.” *HML Enters.*, 2016 WL 5939737, at *7 (citing *In re Marvel Entm’t Grp., Inc.*, 140 F.3d 463, 476 (3d Cir. 1998)).⁷

The second prong references the definition of “disinterested person” under Section 101(14) of the Bankruptcy Code—which incorporates an adverse interest requirement, thereby overlapping with the first prong. *Id.* (citations omitted). As a result, the Court may address both prongs of the analysis by determining whether an attorney holds or represents an adverse interest to the estate. *In re Black & White Stripes, LLC*, 623 B.R. 34, 49 (Bankr. S.D.N.Y. 2020) (citations omitted).⁸

Courts also examine whether an attorney’s representation of the Trustee creates a potential conflict of interest. *Carickhoff v. Goodwin (In re Decade. S.A.C., LLC)*, No. 18-11668 (CSS), 2022 WL 486952, at *6 (Bankr. D. Del. Feb. 17, 2022) (citing *Marvel Entm’t Grp.*, 140 F.3d at 476). “A potential conflict is said to be one in which the competition is presently dormant, but may become active if certain contingencies occur.” *HML Enters.*, 2016 WL 5939737, at *7 (quotation omitted).

⁷ “[T]he adverse interest standard is a rigorous one and is sufficiently broad to include a professional with the slightest degree might have some interest or relationship that would color the independent and impartial attitude required by the Code.” *HML Enters.*, 2016 WL 5939737, at *8 (quotations omitted).

⁸ A “disinterested” person is one who: (1) “is not a creditor, an equity security holder, or an insider;” (2) “is not and was not within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor;” and (3) “does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.” 11 U.S.C. § 101(14)(A)–(C).

B. Dundon's Objection Is Timely.

As an initial matter, Dundon, individually, and DCP, properly asserts this objection as interested creditors. *See* 11 U.S.C. § 327(c) (enabling a creditor to object to a trustee's application to employ a professional). The objection is timely even though the Court has already approved the Application to Employ. The Trustee filed his Application on March 31, 2022. (Doc. No. 462), and the Court entered the Order the following day. (Doc. No. 463). Local Rule 2014(d) provides "A party in interest who opposes an application for employment may file an objection within 21 days after the date of service of the application, and such objection shall be set for hearing *notwithstanding the Court's order granting* the application to employ." (emphasis added). Because Dundon filed this Objection within 21 days of the Trustee's service of the Application, the objection is timely. The Court may also consider the issue of whether the Retained Firms have a disqualifying conflict *sua sponte*. *See Decade. S.A.C.*, 2022 WL 486952, at *5.

C. The Retained Firms' Representation of the Trustee Creates an Actual Conflict of Interest Between the Adversary Plaintiffs and the Estate.

Dundon objects to the employment of the Retained Firms because there is an actual conflict of interest for the Retained Firms' to continue to represent creditors (the Adversary Plaintiffs) and debtors (the Trustee on behalf of the Estate). *See* 11 U.S.C. § 101(10). While Section 327 contemplates counsel for creditors also representing debtors if employed for a special purpose, courts consider whether such an arrangement is appropriate under the circumstances by, among other things, ensuring "the undivided loyalty and exclusive allegiance required of a fiduciary to the estate in the bankruptcy is not compromised or eroded." *See In re Austin Temp. Servs., Inc.*, No. 07-11888-FM, 2008 WL 4692368, at *3 (Bankr. W.D. Tex. Oct. 21, 2008) (quotation omitted). In other words, "creditor's counsel can represent the trustee [unless there is an actual conflict of interest] . . . and if such attorney does not hold any interest adverse to the debtor or to

the estate with respect to the matter on which the attorney is to be employed.” *Id.* The Retained Firms cannot meet this threshold because the Estate becomes ““a rival claimant.”” *See W. Delta Oil Co., Inc.*, 432 F.3d at 356 (quotation omitted).

When the Trustee and the Adversary Plaintiffs entered the settlement in the Adversary Proceeding, the Adversary Plaintiffs retained their status as creditors—becoming judgment creditors with a priority wage claim for part of their settlement and general unsecured claims for the remainder. As part of that arrangement, the Retained Firms also became creditors in “An Agreed Fee Request,” entitling them to 33% of the settlement proceeds. *See AAF Players LLC*, 19-05053-cag at Doc. No. 204 ¶ 13(e). This arrangement places the Retained Firms in the untenable position of “dual representation forc[ing] [them] to advance two diametrically opposed goals and depriv[ing] each represented party of ‘unbiased, independent assessments of the available and outstanding claims.’” *See HML Enters.*, 2016 WL 5939737, at *7 (citing *Quarles & Brady, LLP v. Maxfield (In re Jennings)*, 199 F. App’x. 845, 849 (11th Cir. 2006)); *In re Mercury*, 280 B.R. 35, 54 (Bankr. S.D.N.Y. 2002), *aff’d*, 122 F. App’x 528 (2d Cir. 2004) (internal quotation omitted) (“‘Having to divide one’s allegiance between two clients is what Section 327 attempts to prevent.’”). When there is “[a]n active competition between two competing interest, in which one interest can only be served at the expense of the other[.]” there is an actual conflict. *Id.* (quotation omitted). The Retained Firms’ concurrent representation will necessarily place the interest of one party, the Adversary Plaintiffs or the Trustee, over the other. *See Austin Temp. Servs., Inc.*, 2008 WL 4692368, at *4 (finding a conflict of interest when attorneys attempted to represent both the trustee and creditors where the attorneys and their creditor clients had claims against the estate); *Decade. S.A.C., LLC*, 2022 WL 486952, at *5–8 (disqualifying a special counsel and ordering the discouragement of fees after a conflict of interest arose between the trustee and a creditor

represented by the same firm).

By way of example, as outlined at length in Dundon's recent Motion to Dismiss filed in the Adversary Proceeding (Doc. No. 229), the Adversary Plaintiffs assigned certain of their claims and damages to the Trustee as part of the settlement, while retaining their fraud claims against Dundon. The Retained Firms still have a contingent fee interest in the retained fraud claims, but, to Dundon's knowledge, have no stake in the assigned claims. And, Adversary Plaintiffs and the Retained Firms would not be forced to share any of the money recovered from Dundon in the Adversary Proceeding with the estate. This is a clear conflict of interest. Alternatively, it is clearly conceivable that the Retained Firms see more ultimate value in pursuing Dundon in the main bankruptcy than zealously pursuing the remaining fraud claims in the Adversary Proceeding. What is clear is the Adversary Plaintiffs and the Trustee are going after the same source of funds. The Adversary Plaintiffs would get first dollars in the Adversary Proceeding and last dollars in the main bankruptcy.

D. Alternatively, the Retained Firms' Representation of the Trustee Creates a Potential Conflict of Interest Between the Adversary Plaintiffs and the Estate and the Retained Firms Cannot Operate in the Best Interest of the Estate.

There also lies a potential conflict of interest that should disqualify the Retained Firms from continued representation of the Trustee on behalf of the Estate. *See In re Red Lion, Inc.*, 166 B.R. 296, 298 (Bankr. S.D. Tex. 1994) (citations omitted) ("The bankruptcy courts have consistently held that when there is a conflict or potential conflict of interest between the debtor corporation and the owner of such corporation, representation by the same counsel should not be allowed."). "Potential conflicts, no less than actual ones, can provide motives for attorneys to act in ways contrary to the best interests of their clients [Therefore,] it is [important] to ask whether a professional has 'either a meaningful incentive to act contrary to the best interests of the

estate and its sundry creditors—an incentive sufficient to place those parties at more than acceptable risk—or the reasonable perception of one.” *In re Leslie Fay Cos., Inc.*, 175 B.R. 525, 533 (Bankr. S.D.N.Y. 1994) (citing *In re Martin*, 817 F.2d 175, 180–81 (1st Cir. 1987)). If there is plausibility “that the representation of another interest may cause the debtor’s attorneys to act any differently than they would without that other representation, then they have a conflict of interest adverse to the estate.” *HML Enters.*, 2016 WL 5939737, at *7 (quotation omitted). Courts also look to the Code of Professional Responsibility. *Id.* at *8 (citing *In re SBMC Healthcare, LLC*, 473 B.R. 871, 877 (Bankr. S.D. Tex. 2012)).⁹

Here, the Retained Firms are placing themselves in a position that effectively sits on both sides of a litigation—the Adversary Proceeding. Until the Trustee and the Adversary Plaintiffs entered their settlement, they were opposition parties in the Adversary Proceeding. As a co-defendant with Dundon, the Trustee and Dundon did more than align their interests. They shared strategic initiatives, plans, and agreed (right before the settlement and just short of engagement) to retain the same expert to opine on behalf of all defendants. *See* Ex. 1. While Dundon recognizes the alignment of Dundon and the Trustee was for purposes of defeating the class certification, that does not change the historical facts of Dundon and the Trustee sharing critical defense information and materials as former co-defendants. Because the Adversary Plaintiffs’ claims against Dundon in the Adversary Proceeding are live and pending, the Retained Firms’ concurrent representation of the Adversary Plaintiffs in the Adversary Proceeding and the Trustee for investigation into claims against Dundon in a future lawsuit is problematic. Such concurrent representation will grant

⁹ Texas disciplinary rule 1.06(a) states simply: “A lawyer shall not represent opposing parties to the same litigation.” Tex. Disciplinary Rules Prof’l Conduct R. 1.06(a), reprinted in 3B Tex. Govt. Code Ann., tit. 2, subtit. G, app. A at 102 (West 2013). The accompanying comment to Rule 1.06 is insightful in this analysis: “The term ‘opposing parties’ as used in this Rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party.” *Id.* at cmt. 2.

the Retained Firms access to information and strategy they otherwise would not know about to use in the Adversary Proceeding.

The Trustee believes the class settlement resolves existing conflicts between the Adversary Plaintiffs and the Estate because their “interests in enhancing the Estate through legitimate claims are now aligned.” (Doc No. 462 ¶¶ 16, 36). However, the Trustee cannot unwind that cork and become a vehicle for the Retained Firms to utilize the Trustee’s knowledge and resources to pursue the Adversary Proceeding.¹⁰

IV. PRAYER

WHEREFORE, Dundon prays this Court rescind the Court’s Order (Doc. No. 463), sustaining Dundon’s objection to the Trustee’s Application (Doc. No. 462), and grant Dundon such other and further relief, whether at law or in equity, to which they are justly entitled.

¹⁰ Dundon notes Dundon has a motion to dismiss pending in the Adversary Proceeding that should dismissal all causes of action in the Adversary Proceeding, and that should the Court dismiss such claims, the conflict between the Adversary Plaintiffs and the Trustee, and therefore this objection, would become moot.

Dated: April 21, 2022

Respectfully submitted,

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THOMAS G. DUNDON**

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that on this 21st day of April 2022, a true and correct copy of the foregoing document was served via electronic means or by first class mail as listed on the Court's ECF noticing system and by first class mail to those persons filing a notice of appearance requesting notice and persons filing a proof of claim, all pursuant to the Court's order for limited notice mailing entered on the Court's docket as document no. 79.

/s/ Brent D. Hockaday
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AMENDED MAILING MATRIX

PER ORDER LIMITING MATIX (DOCKET n. 79)

(UPDATED 3/30/22)

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